No. 04-15044

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN DOE, a minor, by his mother and next friend, Jane Doe,

Plaintiff/Appellant,

v.

KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE, and CONSTANCE LAU, NAINOA THOMPSON, DIANE J. PLOTTS, ROBERT K.U. KIHUNE, and J. DOUGLAS ING, in their capacities as Trustees of the Kamehameha Schools/Bernice Pauahi Bishop Estate,

Defendants/Appellees.

Appeal from the United States District Court for the District of Hawai'i
Civil No. 03-00316-ACK

PETITION FOR REHEARING EN BANC

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RULE 35(b) STATEMENT

Based on my professional judgment, I believe that this appeal requires an answer to the following question of exceptional importance to the law of this Circuit:

Whether a remedial preference in admissions for Native Hawaiians by an entirely private Native Hawaiian educational organization violates 42 U.S.C. § 1981, even though it remedies serious ongoing harms to Native Hawaiians and Congress has enacted numerous similar preferences as part of the special political and trust relationship between the United States and the Native Hawaiian people.

STATEMENT

This case involves a novel and unique issue of great importance in this Circuit. Over a strong dissent, the panel majority used our oldest federal civil rights statute, 42 U.S.C. § 1981, to override a preference for Native Hawaiian children in admission to a private Native Hawaiian educational institution, the Kamehameha Schools, that has operated successfully in Hawaii for almost 120 years. The panel's decision is unprecedented: it is the first in our nation's history to invalidate a *remedial* education policy by a *private* school for the benefit of any minority group, much less an *indigenous* people. It did so even though there is no dispute that the admissions policy remedies severe ongoing harms to Native

Hawaiians, and no dispute that Congress has itself enacted a host of explicit preferences for Native Hawaiians to remedy those same harms. Kamehameha Schools respectfully submits that the decision warrants this Court's en banc review and reversal.

The facts in the case are undisputed. Appellee Kamehameha Schools were founded in 1887 under a "charitable testamentary trust established by the last direct descendant of Hawaii's King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians." *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). Kamehameha is entirely private and receives no federal funds. The Schools give preference in on-campus admissions to Native Hawaiian children, defined as descendants of the indigenous inhabitants of the islands prior to western landfall in 1778. The Schools can accommodate only a fraction of the current need: they have only 5400 on-campus openings for over 70,000 school-aged Native Hawaiian children. Plaintiff Doe, a non-Native Hawaiian student, complained that he was denied admission to Kamehameha on account of race, in violation of 42 U.S.C. § 1981, and sought to jump a long queue of qualified Native Hawaiian applicants waiting to gain admission to the Schools.

There was no dispute below that severe educational and socioeconomic deficits continue to plague Native Hawaiians long after the near destruction of their

population and culture and the overthrow of their sovereign government in 1893. Congress has described this history as devastating and issued an apology resolution on behalf of the United States. Pub. L. No. 103-150, 107 Stat. 1510 (1993). As the panel majority acknowledged, the Schools "present[ed] abundant evidence demonstrating that native Hawaiians are overrepresented in negative socioeconomic statistics such as poverty, homelessness, child abuse and neglect, and criminal activity; they are more likely to live in economically disadvantaged neighborhoods and attend low-quality schools; and, because of low levels of educational attainment, they are severely under-represented in professional and managerial positions, and over-represented in low-paying service and labor occupations." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, No. 04-15044, slip op. at 8951 (9th Cir. Aug. 2, 2005) (attached in appendix).

Nor was there any dispute below that Kamehameha Schools aim at remedying these severe socioeconomic and educational disadvantages among Native Hawaiians and has been exceptionally successful in doing so. The Schools provide a curriculum with a unique emphasis on Native Hawaiian language, history, music, arts, genealogy, land stewardship, and community service, enabling a Native Hawaiian culture that once bordered on extinction to survive within its only homeland. For these reasons, the district court granted summary judgment to the Schools, holding that the admissions policy "serves a legitimate remedial

purpose by addressing the socioeconomic and educational disadvantages facing Native Hawaiians, producing Native Hawaiian leadership for community involvement, and revitalizing Native Hawaiian culture." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1172 (D. Haw. 2003).

The panel majority accepted all these premises, but reversed on the narrow ground that Kamehameha's policy posed an "absolute bar" to the admission of non-Native Hawaiians. Slip op. at 8951. Assuming (incorrectly) that that policy was "exclusively racial" in nature, *id.* at 8960, the panel majority (Bybee, J., joined by Beezer, S.J.) correctly declined to apply to the Schools the strict scrutiny applicable to public entities, *id.* at 8931-32, and held that the Schools need demonstrate only that the Native Hawaiian admissions preference had a rational relationship to a legitimate remedial purpose. *Id.* at 8946. But in applying that standard, the panel majority found a virtually exclusive program insufficiently tailored to such a purpose. In doing so, it chose to ignore numerous congressional enactments reflecting the United States' "special trust relationship" with the Native Hawaiian people. *See id.* at 8960-61.

Judge Graber dissented, contending that this Court should have upheld the admissions policy as legitimate in light of those federal statutes. Recognizing this Court's "duty to harmonize § 1981 . . . with the statutory context in which

Congress acted," *id.* at 8963, the dissent would have found that "Congress has shown by its actions that an exclusive, remedial, racial preference *can* be permissible at least when it is employed to remedy demonstrable and extreme educational and socioeconomic deficiencies that are faced by a racial group that (a) is descended from people whose sovereignty and culture were upended and nearly destroyed, in part by the actions of the United States, and (b) consequently enjoys a special trust relationship with the United States government that parallels (but is not identical to) that between the federal government and Native Americans." *Id.* at 8967.

The relevant statutory context includes numerous federal laws providing remedial benefits and preferences targeted expressly and often exclusively toward Native Hawaiians. *See id.* at 8957-59, 8964-66; *Doe*, 295 F. Supp. 2d at 1150, 1151-54, 1167-68, 1174-75. Of particular relevance to this case, the Native Hawaiian Education Act (NHEA), enacted by Congress in 1994 and again in 2002, provides preferential benefits to improve the educational attainment of Native Hawaiians. At one time, Congress even directed federal funding to Kamehameha Schools by name to provide "fellowship assistance to Native Hawaiian students." Slip op. at 8965 (Graber, J., dissenting) (quoting 20 U.S.C. § 4905(a) (1988)).

As the district court noted, the NHEA acknowledges "that the United States has a political relationship with and a special trust obligation to Native Hawaiians

as the indigenous people of Hawaii." *Doe*, 295 F. Supp. 2d at 1150. As the 2002 NHEA explained, "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship," 20 U.S.C. § 7512(12)(B); "the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives," *id.* § 7512(12)(D); and "the political relationship between the United States and the Native Hawaiian people has been recognized and reaffirmed by the United States," *id.* § 7512(13).

The dissent would have concluded that this "statutory context demonstrates that Congress did not intend for § 1981 to bar all exclusive preferences to remedy the severe educational deficits suffered by Native Hawaiians, a population unique within the country," and that Kamehameha's policy does not violate § 1981 because it is "currently required to combat those deficits." Slip op. at 8967.

The Schools file this petition for rehearing en banc because they respectfully submit that the conclusion of the dissent, not the panel majority, is correct. The petition is timely because Appellee's Motion to Extend Time to File a Petition for Rehearing until August 23, 2005, was granted by order dated August 12, 2005.

REASONS FOR GRANTING THE PETITION

THIS IS A CASE OF EXCEPTIONAL IMPORTANCE TO THE LAW OF THIS CIRCUIT

As the panel majority acknowledged, this is "a case of first impression in our circuit," and the issue is "a significant one in our statutory civil rights law." Slip op. at 8926. No court has previously invoked § 1981 to invalidate a *remedial* admissions policy of a *private* educational institution favoring *any* minority group, much less one that remedies harms to an *indigenous* people with whom Congress has a special political and trust relationship. Because of its geography, this Circuit has special knowledge about the history and status of the nation's Native peoples, and is particularly well situated to interpret Congress' intent in ensuring their fair treatment. For the following reasons, this Court should grant en banc review and reverse the panel majority's decision.

A. The Panel Majority Incorrectly Held Kamehameha Schools' Preference for Native Hawaiians "Exclusively Racial," a Characterization the Schools Did Not "Concede"

The panel majority recited at length the many federal statutes providing explicit preferences to Native Hawaiians based on the federal government's special political relationship with Native Hawaiians, slip op. at 8957-59, but then declined to take those statutes into account in interpreting § 1981 in this case. The panel majority found consideration of these statutes supposedly "foreclosed by Appellees' explicit concession that the preference at issue constitutes

discrimination on the basis of race." *Id.* at 8960; *see id.* at 8961 (stating that such deference "does not apply to the classification employed by the Kamehameha Schools, which Appellees concede to be exclusively racial in nature, design and purpose"); *id.* at 8962 ("Because Appellees do not argue that the classification in question should be viewed as anything but expressly racial, we refrain from addressing the matter further.").

These assertions, made without any record citation, wholly misrepresent the position of the Kamehameha Schools. The Schools never "conceded" that a Native Hawaiian preference is "exclusively racial." To the contrary, the Schools vigorously asserted throughout this litigation that Native Hawaiians have a special trust relationship with the United States and a political status akin (though not identical) to that of Native Americans and Alaska Natives that must be taken into account in construing the application of § 1981.*

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* *See* Appellees' Answering Br. at 6-8, 39-46; Transcript of Oral Argument, Nov. 4, 2004, at 29-31 (in which counsel for Kamehameha Schools stated that the "political classification" of Native Hawaiians, which is based on a trust relationship with the United States, "is very important to the interpretation of [§] 1981" in this case). *See also* Mem. in Support of Defendants' Motion for Summary Judgment at 84 ("Congress' findings in the NHEA should be given great weight, because they are based in part on Congress' special trust relationship with the Native Hawaiian people."); *id.* at 27-36, 56 n.4, 76-85; Reply Mem. in Support of Defendant's Motion for Summary Judgment at 18-19 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)). Appellees also adopt these arguments made in the amicus briefs of the State of Hawaii filed at each stage of this proceeding.

To be sure, the Schools have acknowledged that their admissions preference, like the Indian blood quantum preference upheld in *Morton v. Mancari*, 417 U.S. 535, 554 (1974), has "a racial component," *Rice v. Cayetano*, 528 U.S. 495, 519 (2000). But they never suggested that such preferences are *exclusively* racial, arguing instead that Native Hawaiians have a unique status that can be *both* racial and political, and that these categories need not be mutually exclusive. Judge Graber's dissent accurately captured both the Schools' position and the current state of the law: "I do not perceive such a dichotomy between the racial and the political aspects of the Schools' preference for Native Hawaiian applicants. That is, if 'Native Hawaiian' is indeed a racial category, then Congress has shown by its actions that an exclusive, remedial, racial preference *can* be permissible" when used to remedy ongoing harms to a once-sovereign indigenous people with whom the United States "enjoys a special trust relationship." Slip op. at 8966-67.

B. In Deciding Whether the Kamehameha Schools' Admissions Policy Has a Legitimate Remedial Purpose, the Panel Majority Mistakenly Disregarded Congress' Systematic Statutory Scheme of Remedial Preferences for Native Hawaiians

After having correctly identified the pivotal issue in this case as "whether the Schools can articulate a legitimate nondiscriminatory reason justifying [its] racial preference," slip op. at 8948, the panel majority proceeded incorrectly to ignore Congress' reasons for enacting a host of similar preferences. The courts

have accepted for decades that the United States has a unique political relationship with its Native peoples and that programs giving them special treatment need be merely "tied rationally to the fulfillment of Congress' unique obligation." *See, e.g., Morton v. Mancari,* 417 U.S. at 555; *Artichoke Joe's Grand Casino v. Norton*, 353 F.3d 712, 731-37 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004). Were Kamehameha Schools a Native institution in the continental United States or Alaska, there would be little question that it could permissibly restrict admission to Native schoolchildren so long as their numbers and need exceeded the available places.

Thus the question in this case is whether Congress could have intended some different result under § 1981 simply because the indigenous people here is Native Hawaiian. Notwithstanding the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000) (invalidating a restriction of the franchise to Native Hawaiians when voting for state government officeholders), and the fact that Native Hawaiians may not yet have the quasi-sovereign status of a federally recognized Indian tribe, Congress has recognized the political status of Native Hawaiians in establishing and justifying numerous remedial programs for their exclusive benefit. The panel majority erred in disregarding this powerful evidence of what, in the eyes of Congress, qualifies as a legitimate remedial reason for a preference of the sort contained in Kamehameha Schools' admissions policy.

This Court's other cases concerning Native Hawaiians, by contrast, take account of such congressional policy. For example, this Court recently applied rational-basis review to a race discrimination claim brought against the Department of the Interior's regulatory exclusion of Native Hawaiians from the federal process for the recognition of Indian tribes. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1278, 1282 (9th Cir. 2004) (accepting the government's argument that "the classification is politically based and therefore reviewed under the rational basis test" rather than "racially based and therefore subject to strict scrutiny," because "the indigenous Hawaiians . . . were once subject to a government that was treated as a coequal sovereign alongside the United States"), *cert. denied*, 125 S. Ct. 2902 (2005). *See also United States v. Nuesca*, 945 F.2d 254, 257-58 (9th Cir. 1991) (applying rational-basis scrutiny to a distinction between rights of Native Hawaiians and Alaska Natives).

The panel majority erred in failing to accord similar deference here to congressional determinations about the political status of Native Hawaiians. As Judge Graber correctly noted in dissent, this Court "should look directly to congressional intent" in interpreting § 1981, and indeed its "only task is to discern Congress' intent with respect to the application of § 1981" to Kamehameha's preference. Slip op. at 8967, 8963. *See Patterson v. McLean Credit Union,* 491 U.S. 164, 188 (1989); *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976) (relying

on evidence of contemporaneous congressional policy in interpreting application of § 1981). In doing so, as the dissent rightly noted, this Court has a duty to "harmonize § 1981, to the extent possible, with the statutory context in which Congress acted," slip op. at 8963 (citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981))—in particular the plethora of federal laws enacted by Congress over the past two decades giving explicit and often exclusive preferences to Native Hawaiians.

With all due respect, it was error for the panel majority to assert that review of Congress' systematic statutory scheme concerning Native Hawaiians would be too arduous. *See* slip op. at 8953 (suggesting that such an endeavor would be challenging both to "separation of powers and our own sanity"). To the contrary, it is a highly relevant and judicially manageable task to review Congress' acknowledgements that Native Hawaiians have a "unique status" and that there is a "political relationship" between the United States and "the indigenous native people of Hawaii." *Id.* at 8964-67 (Graber, J., dissenting). As the dissent so clearly understood, "[t]hese factors distinguish Native Hawaiians from the other racial groups mentioned by the majority . . . who have received special funding." Slip op. at 8967. And as the district court correctly observed below, "it would indeed make little sense for Congress to open the door with remedial programs that preference Native Hawaiians, yet have it simultaneously shut by § 1981 with

respect to Kamehameha School's similar remedial plan." *Doe*, 295 F. Supp. 2d at 1174.

Nor was the panel majority correct to suggest that Congress must formally recognize Native Hawaiians as a sovereign entity before its remedial programs for Native Hawaiians may be found permissible under § 1981. Slip op. at 8961. As Judge Graber noted in dissent, "we need not decide that Native Hawaiians have any particular political status to recognize, as Congress has, that the Kamehameha Schools pursue unique remedial objectives and may, consistent with congressional intent, employ special remedial tools." *Id.* at 8967.

C. Contrary to the Panel Majority's Opinion, § 1981 Does Not Bar An Exclusive Remedial Program Necessary to Remedy Severe and Ongoing Harms to an Indigenous People.

Even apart from its errors in failing to take congressional policy into account, the panel majority misapplied the legal framework this Court has set forth for reviewing remedial race preferences under § 1981, independently warranting rehearing en banc. *See Johnson v. Transp. Agency*, 770 F.2d 752, 755 n.2 (9th Cir. 1984) (citing with approval *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968-69 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981)), *aff'd*, 480 U.S. 616 (1987).

The panel majority correctly held that if Kamehameha satisfied its burden of establishing a legitimate remedial reason justifying race preferences, "the burden . . . shifts to the plaintiff to prove that the school's articulated reason is a pretext for

unlawful race discrimination," slip op. at 8947, or "unnecessarily trammels" the rights of non-Native Hawaiians, *id.* at 8949. But the panel majority erred in applying that standard, incorrectly holding that the admissions policy "categorically 'trammels' the rights of non-Hawaiians" because it acts as an "absolute bar" to their admission. *Id.* at 8951.

That reasoning is erroneous for two reasons. First, it is dubious whether Kamehemaha imposes an "absolute bar" to the participation of non-Native Hawaiians. While the *campus* programs are currently so scarce that they are open virtually exclusively to Native Hawaiians, it is undisputed that Kamehameha also runs other educational programs to which non-Native Hawaiians are regularly admitted. Moreover, the panel majority ignored the district court's finding that, even as to the campus programs, the trustees review and reconsider the preference regularly so that "[t]he preference provided by the admissions policy is not perpetual nor an absolute bar to the admittance of other races to Kamehameha Schools." *Doe*, 295 F. Supp. 2d at 1146.

Second, even if the program were construed as an "absolute bar" to non-Native Hawaiian admissions, it does not follow automatically that it *unnecessarily* trammels the rights of non-Native Hawaiians. *See Setser v. Novack Inv. Co.*, 657 F.2d 962, 968-69 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *Davis v. City of San Francisco*, 890 F.2d 1438, 1448 (9th Cir. 1989); *Rudebusch v. Hughes*, 313

F.3d 506, 522-23 (9th Cir. 2002) (rejecting argument that a pay equity preference for minorities and women "unnecessarily trammeled" the rights of white male plaintiffs). While it is *plaintiff's* burden to show that Kamehameha's policy is unnecessary to remedy severe and ongoing harms to Native Hawaiians, plaintiff failed to adduce any evidence below to sustain that burden.

To the contrary, the undisputed evidence in the record below supports the inference that virtual exclusivity for Native Hawaiian applicants *is* necessary as long as the queue of needy and qualified Native Hawaiian applicants to Kamehameha remains so desperately long. Every space in the program that goes to a non-Native Hawaiian deprives a Native Hawaiian student of a space in an educational program of unique cultural, historical, and communal significance to the Native Hawaiian people. As the district court correctly concluded, Kamehameha's Policy satisfies the Title VII standard under the settled law of this Circuit because its "means are not excessive in light of the great need for Native Hawaiian education." *Doe*, 295 F. Supp. 2d at 1172.

A non-Native Hawaiian applicant denied admission to Kamehameha Schools faces no comparably adverse consequences. Title VII analysis recognizes that the legitimate expectations of the non-preferred class help determine whether a preference unnecessarily trammels the rights of the non-preferred group. *See Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987). Because Kamehameha was

created pursuant to Princess Pauahi's Will, the highly subsidized education offered to Kamehameha students is analogous to a testamentary gift to which non-Native Hawaiians have no legitimate expectation. Moreover, the charitable trust that Kamehameha administers is supported by Native Hawaiian lands. This Court has acknowledged in other contexts involving Native peoples the importance of lands to Native interests. *See Artichoke Joe's*, 353 F.3d at 735. Under Native Hawaiian traditions, the Hawaiian monarchs held land for communal benefit, not under Western-style notions of individual fee simple. *See, e.g., Robinson v. Ariyoshi*, 658 P.2d 287, 310 n.33 (Haw. 1982). Like other ali'i (high chiefs), Princess Pauahi followed such traditional Native Hawaiian land concepts when she died childless and bequeathed her lands into a private trust designed to be administered for the benefit of her people. *See* COBEY BLACK & KATHLEEN DICKENSON MELLEN, PRINCESS PAUAHI AND HER LEGACY 87-88 (1965). The panel majority's new legal rule–that §1981 categorically bars any race-conscious policy that limits benefits to one group–would take the benefits of such property from its intended beneficiaries and transfer them to others, yielding the perverse result that Kamehameha could achieve its mission of redressing harm to Native Hawaiians only by educating non-Native Hawaiians.

Finally, "context matters" when reviewing the bona fides of a race-conscious remedial program. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). An "absolute

bar" is more tenable in the private education context than in the employment context. While employers use race preferences to integrate their own operations based on the demographics of the labor pool, educational institutions train students for the workforce outside in the larger society. *See Grutter*, 539 U.S. at 330-33; *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063-67 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000). Temporary immersion in a Native Hawaiian cultural education in grades K-12 is fully compatible with integration into more diverse shopfloors and workplaces upon graduation. Moreover, while the state guarantees every student an elementary and secondary education, it does not guarantee every worker a job, so the harm to non-Native Hawaiians if they cannot attend Kamehameha Schools is not comparable to exclusion in the employment context.

Situations in which a preference must operate as a virtual exclusion are rare, but that does not excuse the Court from examining in this case whether such a preference is necessary to accomplish the Kamehameha Schools' urgent remedial mission. The circumstances of this case are unique. The needs of Native Hawaiians are immense, in part because their lands have been systematically taken from them during the past 150 years, and the limited resources of the Schools are among the last available to them. The court erred in failing to consider whether, in light of these circumstances, the admissions policy is necessary to accomplish

Kamehameha's (and Congress') mission of remedying the near destruction of Native Hawaiian culture and producing graduates who will carry on that remediation.

CONCLUSION

For these reasons, Appellees respectfully request that this Court rehear this case en banc and reverse the panel majority's decision.

Dated: August 23, 2005

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit 32-1 for Case Number 04-15044, I certify that that the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,056 words.

DATED: August 23, 2005

Kathleen M. Sullivan

No. 04-15044

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE, a minor, by his mother
and next friend, JANE DOE,

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KAMEHAMEHA SCHOOLS/BERNICE
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Defendants/Appellees.

On Appeal from the United States District Court
for the District of Hawaii
Honorable Alan C. Kay, Senior District Judge

APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING EN BANC

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APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING EN BANC

Defendants/Appellees Kamehameha Schools/Bishop Estate and its five trustees ("KSBE") have filed a Petition for Rehearing En Banc ("KSBE Pet."). KSBE concedes that en banc consideration is not necessary to secure or maintain uniformity of this Court's decisions. KSBE further concedes that the panel decision does not conflict with any decisions of the United States Supreme Court or other courts of appeals. (In fact, as noted below, only the opposite decision by the panel would have created such a conflict.) Instead, KSBE asserts only that this appeal involves a "question of exceptional importance to the law of this Circuit." KSBE Pet. at 1. While Plaintiff/Appellant John Doe ("Plaintiff") agrees that the case is important, the legal principles involved are not exceptional. The panel simply applied established principles of law to a new and distinctive set of facts—a thoroughly unexceptional judicial function.

The distinctive facts are that KSBE, which operates private schools in Hawaii, concedes that it discriminates in admissions on the basis of race—categorically excluding children who lack "Native Hawaiian" ancestry—and has done so for "almost 120 years." *Id.* The panel majority and the dissent agreed on this point. The established law is that 42 U.S.C. § 1981 prohibits private schools from denying admission to prospective students because of their race. *See Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Also well-established, if more recently, is that discrimination based on Hawaiian ancestry is *racial* discrimination for purposes of the civil rights laws, and

such discrimination does not escape scrutiny under the Constitution and laws of the United States merely because Native Hawaiians bear some resemblance to mainland Indian tribes. *See Rice v. Cayetano*, 528 U.S. 495, 514-22 (2000).

Therefore, despite KSBE's rhetoric, this case involves no dramatic or unusual conclusion of law. KSBE's petition for rehearing en banc should be denied.

ARGUMENT

1. Much of KSBE's argument is premised on a mischaracterization of the facts. The petition frames the question as involving a "remedial preference" in admissions for Native Hawaiians. KSBE Pet. at 1. But KSBE's admissions policy is neither "remedial" (as discussed below) nor a mere "preference" based on race. To the contrary, KSBE's own averments establish that its policy operates such that (with the single exception of one student admitted in 2002) "in approximately the last four decades, all of [KSBE's] admittees to its regular, academic year programs possessed some degree of Hawaiian ancestry." Excerpts of Record ("E.R.") at 66 (Amended Answer ¶ 12). KSBE explicitly conceded that "were Plaintiff of Hawaiian ancestry, Plaintiff would likely have been admitted to a Kamehameha campus based on his application for the 2003-2004 school year." E.R. at 68 (Amended Answer ¶ 16).

Thus, the panel rightly found that KSBE's policy "operates as an absolute bar to admission of those of the non-preferred race." Slip op. at 8926. The panel noted

that the fact that KSBE admitted one non-Hawaiian ancestry student in 2002 "owed more to accident than design" and "prompted an immediate full-scale investigation and promise, on the part of School administrators, to ensure that admission remained for native Hawaiians only." *Id.* at 8948 n.8. The dissent agreed with the panel majority on the categorical nature of KSBE's admissions policy, observing that KSBE "grants an *exclusive* preference to Native Hawaiian applicants." *Id.* at 8966 (emphasis added); *accord id.* (an "exclusive preference for Native Hawaiians"); *id.* at 8967 ("an exclusive . . . racial preference").

As a factual matter, then, this case cannot be cast as one that involves a mere racial "preference," conjuring up the notion that KSBE "consider[s] race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). Nor is this a case involving an attempt to promote racial "diversity" in education. *Cf. id.* at 328. Rather, as the petition eventually concedes, KSBE's admissions policy "operate[s] as a virtual exclusion" of children who lack Hawaiian ancestry, KSBE Pet. at 17, and it assures "virtual exclusivity for Native Hawaiian applicants," *id.* at 15. But the word *virtual* here is a fig leaf: KSBE's policy is one of categorical racial segregation.

2. In no relevant legal sense is the racially exclusionary policy "remedial," as the petition attempts to characterize it. KSBE purports to be "remedying" (in its own words) perceived "severe socioeconomic and educational disadvantages among

Native Hawaiians." KSBE Pet. at 3. But the governing law has long been that racial quotas may not be justified on the theory that they are necessary to remedy *societal* discrimination or disadvantage. Where strict scrutiny applies, the formulation is that "discrimination in primary and secondary schooling" in the wider society—or even "past discrimination in a particular industry"—"cannot justify the use of an unyielding racial quota." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

While stated in different form, the law of Title VII is to the same effect: action is (validly) "remedial" only if designed to remedy an employer's own practices, not to address societal conditions in general: "Remedial action is valid under Title VII only if it is designed 'to eliminate a manifest racial . . . imbalance.' " *Rudebusch v. Hughes*, 313 F.3d 506, 523 (9th Cir. 2002) (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979)). KSBE has conceded on the record that this precept refers to "the remediation of *internal* imbalances, *i.e.*, the under-representation of certain racial minorities *within the employer's own workforce*." E.R. at 76 (final emphasis added). KSBE's racially exclusionary admissions policy is obviously not directed at remedying its own internal imbalances. To the contrary, it is designed to *perpetuate* the "Hawaiians only" policy that has characterized Kamehameha Schools from their inception. KSBE's attempt to justify its racial exclusiveness as a remedy for asserted discrimination and disadvantage in society at large is contrary to the law of this Circuit and of the Supreme Court. It presents no basis for en banc review.

3. Much of the petition is devoted to the proposition that racially exclusive policies that discriminate in favor of Native Hawaiians should be analyzed under less exacting legal standards than apply to other forms of racial discrimination, because of Hawaiian history, because of a "special trust relationship," or (by way of analogy) because of the political status of Native American tribes. *See* KSBE Pet. at 6-9.

This is precisely the argument the Supreme Court rejected in *Rice v. Cayetano*. *Rice* involved a racially exclusive voting scheme that limited the franchise to persons of Hawaiian ancestry. A panel of this Circuit had accepted the argument—identical to the one KSBE offers here—that "the federal government and the state of Hawaii have the same special relationship with and owe the same unique obligation to native Hawaiians as the federal government does to Indian tribes," and had concluded that "the voting restriction is not primarily racial, but legal or political." 146 F.3d 1075, 1079 (9th Cir. 1998). Relying on these propositions, the panel in *Rice* rejected constitutional challenges to the racially exclusive voting scheme. *See id.* at 1081, 1082 (relying on the "unique trust relationship" and "special trust relationship").

The U.S. Supreme Court reversed. The Court held that limiting the franchise on the basis of Hawaiian ancestry was a "race-based voting qualification." 528 U.S. at 517. As particularly relevant here, the Court relied on the principle that ancestry-based discrimination is *racial* discrimination for purposes of "the Reconstruction era civil rights laws," namely, 42 U.S.C. § 1981. 528 U.S. at 515 (citing *Saint Francis*

College v. Al-Khazraji, 481 U.S. 604, 613 (1987), a § 1981 case).* The Court then addressed—and explicitly rejected—the argument that "exclusion of non-Hawaiians from voting is permitted under our cases allowing the differential treatment of certain members of Indian tribes," *id.* at 518, on the ground that the racially exclusive voting scheme was not "the internal affair of a quasi-sovereign." *Id.* at 520; *see also id.* at 526, 527 (Breyer, J., joined by Souter, J., concurring in the result) (agreeing because the electorate was defined in a way "not analogous to membership in an Indian tribe," that is, "not like any actual membership classification created by any actual tribe"). *Rice* is controlling here and disposes of KSBE's argument that its racially exclusive policy may be justified by analogy to the internal affairs of a sovereign Indian tribe. Therefore, KSBE's the argument provides no basis for en banc review.

KSBE's contention is likewise contrary to this Circuit's post-*Rice* decisions. Thus, in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005), the Court explained that "*Rice* explicitly reaffirmed and distinguished the political, rather than racial, treatment of Indian tribes." The Court then explained when each kind of treatment is appropriate: racial treatment is demanded

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* Note that the restriction in *Rice* limited the franchise to descendants of "the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778." 528 U.S. at 509. KSBE uses an essentially identical classification, limiting admission to those children with ancestry from "the aboriginal peoples inhabiting the Hawaiian Islands that exercised sovereignty and subsisted in the Hawaiian Islands in 1778." 2 Supplemental Excerpts of Record at 489 (declaration of KSBE's Executive Director of Admissions & Financial Aid).

in cases (like *Rice* and the present case) "concern[ing] the right of individuals," while political treatment is demanded in cases (like *Kahawaiolaa* itself) that concern "the legal relationship between political entities." *Id.* The Court held that discrimination that is "based on race or national origin and not on membership or non-membership in tribal groups can be race discrimination subject to strict scrutiny" or (by analogy) undiminished Title VII scrutiny. *Id.*; *accord Means v. Navajo Nation*, No. 01-17489, slip op. 11191, 11206, 2005 U.S. App. LEXIS 18031, at *22 (9th Cir. Aug. 23, 2005) (rejecting an equal protection challenge because the challenged statute subjected the plaintiff "to Navajo criminal jurisdiction, not because of his race, but because of his political status as an enrolled member of an Indian tribe"). Just last month, the Court expressly reaffirmed *Kahawaiolaa*'s understanding of *Rice*, and its consequent rejection of KSBE's "Indian tribe" argument, in *Arakaki v. Lingle*, No. 04-15306, slip op. 11853, 11889, 2005 U.S. App. LEXIS 18839, at *54 (9th Cir. Aug. 31, 2005).

KSBE's argument is also contrary to *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 154 F.3d 1117, 1119-20 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000). There, the Court ruled that notwithstanding "the government's trust obligation" to American Indians, *id.* at 1120 n.6, and even despite the presence of an "Indian Preferences exemption" for particular conduct, *id.* at 1119, Title VII's general mandate against "national origin" discrimination applies with undiminished force to discrimination against, or in favor of, American Indians.

4. Finally, KSBE contends that en banc review is warranted because Congress has, in other contexts, given "explicit and often exclusive preferences to Native Hawaiians." KSBE Pet. at 12. This argument is unworthy of en banc consideration.

On this issue, the panel majority expressly "agree[d] with the dissent that we should read statutes capable of coexistence 'to give effect to each.'" Slip op. at 8954 (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). The majority carefully considered the principal statute urged by the dissent, *see* slip op. at 8953-54 (considering 20 U.S.C. § 4905(a) (repealed 1994)), and took comprehensive note of the "numerous statutes providing separate benefit programs for native Hawaiians or including them in benefit programs that assist other native people," slip op. at 8957. Having done so, the majority found "no conflict between § 4905(a), which authorizes federal financial assistance to promote native Hawaiian higher education, and § 1981, which forbids a private institution from erecting an absolute bar to admission or advancement solely on the basis of race"; it found in no other statute "blanket approval for private race discrimination that is otherwise violative of § 1981." Slip op. at 8954. Nothing in KSBE's petition casts doubt on the correctness of these findings.

It is a "cardinal principle of statutory construction that repeals by implication are not favored." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Nothing in any of the statutes cited by KSBE supports the notion that Congress has impliedly repealed or amended 42 U.S.C. § 1981 to permit private racial segregation

in education based on Hawaiian ancestry. To the contrary, as the Supreme Court has recognized, "Congress . . . [has] clearly expressed its agreement that racial discrimination in education violates a fundamental public policy." *Bob Jones University v. United States*, 461 U.S. 574, 594 (1983) (addressing racial discrimination at a private school). The panel opinion harmonized the cited statutes in a straightforward way, correctly declining to read into them an implied repeal of the statutory prohibition on racially exclusive admissions policies by private schools.

5. The remainder of KSBE's petition is devoted to challenging the panel's application of Title VII scrutiny to KSBE's racially exclusionary admissions policy. The panel's application of the law to the facts of this case was straightforward (and undisputed by the dissent), and it does not present the type of issue meriting en banc review. In brief, the panel held that KSBE's policy is unlawful because it "operates as an absolute bar to admission for non-Hawaiians." Slip op. at 8951.

KSBE attacks this conclusion by arguing that "even if [its admissions policy] were construed as an 'absolute bar' to non-Native Hawaiian admissions, it does not follow automatically that it *unnecessarily* trammels the rights of non-Native Hawaiians." KSBE Pet. at 14. It is perfectly plain, however, that an absolute racial bar is sufficient to establish a violation, under settled decisions of the U.S. Supreme Court and this Circuit. Race-based preferences "will not survive Title VII scrutiny if they would 'unnecessarily trammel[] the rights of [non-preferred individuals] ***or*** create[]

an absolute bar to their advancement.' " *Rudebusch*, 313 F.3d at 520 (emphasis added) (quoting *Johnson v. Transportation Agency*, 480 U.S. 616, 637-38 (1987); *see also Johnson*, 480 U.S. at 630 (quoting *Weber*'s use of "absolute bar").

Rudebusch, following *Johnson*, in turn following *Weber*, is perfectly clear that admissions policies *automatically* (to use KSBE' word) violate Title VII scrutiny if they set up an "absolute bar" to the admission of non-preferred individuals. As this Court opined in *Gilligan v. Department of Labor*, 81 F.3d 835, 839 (9th Cir. 1996), "affirmative action programs are illegal if they function as an 'absolute bar' to the advancement of non-preferred groups," period. The panel's application of the law to the essentially undisputed facts was an unexceptional application of these principles.

CONCLUSION

For these reasons, the petition for rehearing en banc should be denied.

DATED: September 14, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court in good standing and counsel of record for Plaintiff/Appellant John Doe.

I further certify that one copy of the foregoing document, namely,

APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR RE-HEARING EN BANC

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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2005.

ERIC GRANT

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